



Options for Third-Party Aircraft Use & Carriage of Candidates for Elected Office

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Upcoming Webinars



Use of Ownership Trusts & International Registry Issues in Aircraft Acquisitions	July 16, 2020 at 1 pm ET
Income Tax Considerations: Family Offices & Business Aircraft	Sept. 17, 2020 at 1 pm ET
Federal Income & Excise Tax Implications of Personal & Entertainment Use of Business Aircraft	Nov. 19, 2020 at 1 pm ET
Sales & Use Taxes on Aircraft: Latest Developments & Key Planning Tools	Dec. 17, 2020 at 1 pm ET

Third-Party Aircraft Use & Carriage of Candidates

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- Aircraft Purchase & Sale Transactions
- Aircraft Ownership & Operating Structures
- Federal & State Tax Planning
- IRS, State & FAA Audits & Enforcement Actions
- Personal Use Guidelines & Calculations
- Aircraft Ownership Trusts

Third-Party Aircraft Use & Carriage of Candidates

Overview



During today's webinar, we will discuss various options for allowing third parties to use your business aircraft, emphasizing the federal income tax and state sales and use tax implications associated with the use of each option, and the non-tax advantages and disadvantages of each option. Given the upcoming federal and state elections, we will also discuss issues relating to using your business aircraft to transport candidates for and holders of federal and state elected office.

Third-Party Aircraft Use

Tax Issues

- ▶ Federal Income Tax – Deducting Expenses
 - Trade or business expense (Code Sec. 162)
 - Qualified Business Use (Code Sec. 280F)
 - Depreciation schedule – 5/7 Year MACRS (Code Sec. 168(c))
 - Depreciation recapture (Code Sec. 1245)
 - Personal Use Disallowance Rules (Code Sec. 274)
 - Passive activity loss limitations (Code Sec. 469)
- ▶ Federal Air Transportation Excise Taxes
 - Federal fuel excise tax credits
- ▶ State Sales and Use Tax
 - Sale for resale exemption
 - Common carrier/interstate commerce exemption
 - Sales tax on rent payments

Third-Party Aircraft Use

Part 135 Charter

- ▶ You lease your aircraft to an on demand air taxi (charter) operator
- ▶ Charter operator operates the aircraft to provide a transportation service to third parties
- ▶ Those third parties are customers of the charter operator and pay the charter operator fees for the transportation provided to them by the charter operator
- ▶ Charter operator pays you a percentage or fixed amount of fees billed to its third party customers

Third-Party Aircraft Use

Non Tax Advantages & Disadvantages of Part 135 Charter

► Non-Tax Advantages:

- Charter operator may charge third parties at any rate (in contrast to complex cost sharing allocations in Part 91 leasing structures and limitations on payment amounts that you may receive using the time sharing alternative, each of which will be discussed later in this webinar)
- Potential for enhanced liability protection planning by having third party operations conducted by the charter operator
- Stricter operating and safety requirements imposed on charter operator

► Non-Tax Disadvantages:

- Charter operator will generally earn a commission for its services
- Added start-up expense to conform aircraft and aircraft documents for charter operations and ongoing additional crew training expense
- Limited airport options available for aircraft operated under Part 135
- Weather restrictions
- Crew flight and duty time period rules/rest requirements

Third-Party Aircraft Use

Tax Considerations Part 135 Charter

- ▶ Federal Income Tax – Deducting Expenses
 - May enhance arguments for deductibility of Code Sec. 162 trade or business expenses relating to aircraft
 - May resolve Code Sec. 280F “qualified business use” requirements
 - May extend aircraft depreciation schedule – 5 v. 7 Year MACRS/6 v. 12 Year ADS. (Code Sec. 168(c))
 - Risk of Code Sec. 1245 recapture if depreciation schedule is extended
 - Does not solve Code Sec. 274(e) personal entertainment use deduction limitation issues
 - Must consider and analyze application of Code Sec. 469 passive activity loss limitation rules
- ▶ Federal Air Transportation Excise Taxes
 - Will apply to charter revenue but may be offset in part by fuel excise tax credits
- ▶ State Sales and Use Tax
 - Common carrier/interstate commerce exemption may apply to charter lease rent
 - Need to consider impact on sale for resale exemption -- headlease/sublease

Third-Party Aircraft Use

Part 91 Aircraft Dry Lease

- ▶ You lease your aircraft without flight crew to a third party
- ▶ Third party lessee pays you rent for its use of your aircraft
- ▶ Third party lessee, by virtue of the dry lease, becomes the aircraft operator when it uses the aircraft
- ▶ Third party lessee must obtain its own pilots from a source unrelated to you
- ▶ You and the third party lessee must agree how to allocate fixed and variable costs relating to the use of the aircraft by each of you
- ▶ You and the third party lessee must have insurance coverage for each party's aircraft operations

Third-Party Aircraft Use

Non Tax Advantages & Disadvantages of Part 91 Dry Leases

▶ Non-Tax Advantages:

- Greater operational flexibility for Part 91 lessee – more airports available, fewer weather restrictions, no FAA imposed crew duty limits
- Less additional start-up expense because no need to conform aircraft and aircraft documents for charter operations and ongoing additional crew training expense

▶ Non-Tax Disadvantages:

- Operations by each party must be incidental to or within the scope of another business conducted by such party
- Number of Part 91 dry lessees is limited (usually recommend that no more than 3-4 leases be in place at any one time depending on relationship of lessor and lessees) to avoid issues with limitations on the provision of common carriage
- Increased liability exposure for Part 91 lessee (and, potentially, for you)
- Need to design, implement and maintain a cost sharing relationship between all aircraft operators and ensure that costs are paid by everyone

Third-Party Aircraft Use

Tax Considerations – Part 91 Dry Lease

- ▶ Federal Income Tax – Deducting Expenses
 - Need to utilize arm’s-length pricing/rent to support deductibility of business expenses under Code Sec. 162
 - May resolve Code Sec. 280F “qualified business use” requirements if you have an unrelated third party as the Part 91 lessee
 - Depreciation schedule should remain at 5/6 year non-commercial. (Code Sec. 168 (c))
 - Does not solve Code Sec. 274(e) personal entertainment use deduction limitation issues
 - Application of Code Sec. 469 passive activity loss limitation rules must be considered and analyzed
- ▶ Federal Air Transportation Excise Taxes
 - Amounts paid by Part 91 lessee should not be subject to FET
- ▶ State Sales and Use Tax
 - Sales tax may apply to aircraft dry lease rent – headlease/sublease issue

Third-Party Aircraft Use

Aircraft Time Sharing

- ▶ Authorized under FAR 91.501(c)(1)
- ▶ You lease your aircraft with flight crew to a third party
- ▶ Third party lessee pays you rent for its use of your aircraft
- ▶ You operate your aircraft to transport the third party time share lessee
- ▶ You charge for the flights conducted under the time sharing arrangement as specified in FAR 91.501(d)

Third-Party Aircraft Use

Aircraft Time Sharing (*cont'd*)

- ▶ FAR 91.501(d) – charges cannot exceed (but may be less than) two times the cost of fuel, oil, lubricants, and other additives used during the flight, plus all of out of pocket expenses for:
 - Travel expenses of the crew, including food, lodging and ground transportation;
 - Hangar and tie down costs away from the aircraft's Operating Base;
 - Insurance obtained for the specific flight;
 - Customs, foreign permit, and similar fees directly related to the flight;
 - In-flight food and beverages;
 - Passenger ground transportation;
 - Flight planning and weather contract services

Third-Party Aircraft Use

Non Tax Advantages & Disadvantages of Time Sharing

▶ Non-Tax Advantages:

- Simplicity – ease of billing, no need to allocate costs
- Same operational flexibility as with Part 91 dry lease – more airports available, fewer weather restrictions, no FAA imposed crew duty limits
- Less additional start-up expense because no need to conform aircraft and aircraft documents for charter operations and ongoing additional crew training expense

▶ Non-Tax Disadvantages:

- Number of Time Sharing lessees is limited (usually no more than 3-4 is recommended depending on relationship of lessor and lessees) to avoid issues with common carriage
- Extremely limited ability to charge for cost reimbursement

Third-Party Aircraft Use

Tax Considerations Time Sharing

- ▶ Federal Income Tax – Deducting Expenses
 - May affect deductibility of Code Sec. 162 trade or business expenses relating to aircraft – may trigger hobby loss analysis under Code Sec. 183
 - May extend aircraft depreciation schedule – 5 v. 7 Yr. MACRS/6 v. 12 Yr. ADS. (Code Sec. 168 (c))
 - Risk of Code Sec. 1245 recapture if depreciation schedule is extended
 - Does not solve Code Sec. 274(e) personal entertainment use deduction limitation issues
 - May be useful to avoid Code Sec. 469 passive activity issues that arise with the use of an aircraft dry lease
- ▶ Federal Air Transportation Excise Taxes
 - Will apply to payments but may be offset in part by fuel excise tax credits
- ▶ State Sales and Use Tax
 - Payments should not be subject to state sales and use taxes

Carriage of Candidates

Relevant Law, Rules & Regulations

- ▶ Section 91.321 of the Federal Aviation Regulations
- ▶ Internal Revenue Code Section 4261
- ▶ The Honest Leadership and Open Government Act of 2007 (enacted September 14, 2007)
- ▶ Federal Election Commission Rules (effective January 6, 2010)
- ▶ Senate and House Ethics Rules

Carriage of Candidates

Complying with Federal Aviation Regulations

- ▶ No special restrictions in the Federal Aviation Regulations on charges to and payments for flights operated under FAR Part 135 for candidates and elected office holders
- ▶ Candidate travel is governed by FAR 91.321 for all non-commercial (FAR Part 91) flights
- ▶ Part 91 operators permitted to receive payment from candidates for Federal, state, and local offices, their agents, leadership political action committee, a political party or non-candidate political committee, or other person traveling for the candidate provided that:
 - Part 91 operator's primary business is not as an air carrier or commercial operator;
 - Applicable Federal, state or local election law requires that candidate make such payment to Part 91 operator; and
 - Payment made may not exceed required amount as calculated under applicable law

Carriage of Candidates

Federal Excise Tax

- ▶ Amounts reimbursed for candidate travel are subject to Code Section 4261 excise tax
- ▶ Provider of aircraft transportation must collect and remit such excise tax to the IRS and timely file a Quarterly Federal Excise Tax Return (IRS Form 720) for the period in which Part 91 operator received such payment (or the date the Part 91 operator provided such transportation, if earlier than the payment date)
- ▶ Provider of aircraft transportation may claim a refund of federal fuel excise tax paid when Code Section 4261 excise tax applies to flight for which such fuel was utilized

Carriage of Candidates

Current Statutory & Regulatory Framework

- ▶ The Federal Election Campaign Act defines a “contribution” to include “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office”
- ▶ “Anything of value” encompasses “the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services”
- ▶ When goods or services are provided at less than the usual and normal charge, *“the amount of the in-kind contribution is the difference between the usual and normal charge for the goods or services... and the amount charged the political committee”*

Carriage of Candidates

Honest Leadership & Open Government Act of 2007

- ▶ Generally, an incumbent is deemed to be a “candidate” until announcement of retirement, *etc.*
- ▶ More than one candidate on flight: Each pays for seats occupied or pro-rata for charter valuation
- ▶ “Deadhead” flights are not counted

Carriage of Candidates

2010 FEC Regulations

- ▶ Approved November 19, 2009
- ▶ Effective January 6, 2010
- ▶ Apply to individuals traveling in connection with campaign for election to Federal office, including candidates, campaign members, security personnel, media members, authorized committees, and leadership of Political Action Committees

Carriage of Candidates

2010 FEC Regulations (*cont'd*)

- ▶ Restrict and, in some situations, prohibit Federal candidates and certain individuals traveling on behalf of such candidates from utilizing non-commercial air travel
- ▶ Revised method for calculating reimbursement rates for permitted non-commercial air travel

Carriage of Candidates

Candidates for U.S. House of Representatives

- ▶ House candidates may fly only on:
 - ▶ Commercial flights;
 - ▶ Aircraft owned and operated by a federal or state government entity; or
 - ▶ Aircraft owned by the candidate or an immediate family member of the candidate or by a corporation or other business entity (excluding publicly owned corporations) in which the candidate or an immediate family member of the candidate owns an interest
 - Immediate family members include: candidate's father, mother, son, daughter, brother, sister, husband, wife, father-in-law or mother-in-law
 - Candidate may not use the aircraft more than her percentage ownership
 - Candidate's committee must report value of such travel as a contribution unless the campaign reimburses such costs to the candidate, a family member or a business entity

Carriage of Candidates

Candidates for U.S. President/Vice President/Senate

- ▶ Candidate or any person traveling on behalf of the candidate or authorized committee must pay their pro-rata share of the “normal and usual charter fare or rental charge for travel on a comparable aircraft of comparable size” for each campaign traveler when using non-commercial, non-government-owned aircraft
 - Normal and usual charter fare or rental charge is amount it would cost to charter a comparable aircraft of comparable size for the given distance or time flown (contact charter operators for pricing)
 - Pro-rata share calculated by dividing normal and usual charter fare or rental charge by number of campaign travelers on the flight traveling on behalf of such candidate or candidate’s authorized committee
 - If more than one candidate on same flight, each campaign pays pro-rata cost for each passenger traveling on behalf of particular candidate

Carriage of Candidates

Candidates for U.S. President/Vice President/Senate (*cont'd*)

- ▶ FEC did not extend the requirement that presidential/vice-presidential and Senate candidates pay the full charter rate for use of non-commercial aircraft to travel on behalf of political committees other than their own campaign committees
 - If commercial service exists between the destinations traveled, candidates may pay the lowest unrestricted and non-discounted first-class airfare rate for each person traveling on non-commercial aircraft on behalf of:
 - National political party committees such as the DNC and RNC;
 - State political party committees; and
 - Federal PACs and other federal political committees, including the candidate's leadership PAC
 - If commercial service exists between the destinations traveled, but not first-class airline service, the lowest unrestricted and non-discounted coach airfare rate applies
 - If commercial service does not exist between the destinations traveled, the full charter rate applies

Carriage of Candidates

Payment & Recordkeeping Requirements

- ▶ Advisable to obtain reimbursement prior to the beginning of flight
 - Payment generally required within seven days after flight begins
 - Unreimbursed value of travel is treated as contribution to candidate or political committee
- ▶ Candidates must maintain and report records pertaining to non-commercial air travel, including flights undertaken, aircraft utilized, identification of passenger information and affiliation with candidate, charter rates, etc.

Carriage of Candidates

Members of U.S. House of Representatives

- ▶ For House members participating in privately sponsored, officially connected travel, gift rule prohibits travel on non-commercial, private or chartered flight absent exceptional circumstances
- ▶ House Code of Official Conduct prohibits members from using personal, official or campaign funds to pay for or reimburse the expenses of a flight on any aircraft unless one of the exceptions in the rule is met
 - Major exceptions are for travel on commercially scheduled flights and flights provided by individuals or companies operating a charter service

Carriage of Candidates

Members of U.S. Senate

- ▶ U.S. senators not expressly prohibited from utilizing non-commercial aircraft (but FEC rules apply if senator is also deemed to be a candidate)
- ▶ Under Senate rules, senators traveling on board non-commercial aircraft must provide reimbursement at the normal charter rate or rental charge for a similar/comparable aircraft

Carriage of Candidates

Carriage of Federal Candidates

- ▶ FAR 121 and 135 certificate holders are not covered by FEC valuation rules
 - Must charge normal rates available to the public for comparable service



Carriage of Candidates

Who is NOT Covered?

- ▶ Federal, state or local appointed officials
- ▶ Federal, state, or local government employees



Carriage of Candidates

State/Local Candidates

- ▶ FAR 91.321 permits reimbursement
- ▶ FEC rules do not apply
- ▶ State election law applies to determine required reimbursement
 - Some permit corporate contributions
- ▶ Federal candidates may campaign for state/local candidates free of FEC restrictions



Questions?

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